IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 4TH OCTOBER 2006 / 12TH ASWINA 1928

CRL.A.No. 634 of 2004

AGAINST THE JUDGEMENT/ORDER IN CRLP.247/2004 Dated 31/03/2004
CC.488/2002 of JUDL.MAGISTRATE OF FIRST CLASS, MAVELIKKARA

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APPELLANT: COMPLAINANT:

MOLLY.Y. SAMUEL, AGED 60 YEARS,
W/O. LATE K.K. SAMUEL, KADAVIL HOUSE,
VAZHUVADY, THAZHAKKARA.

BY ADV. SRI.RASHEED C.NOORANAD

RESPONDENTS: ACCUSED:

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1. NADAVALLIL FINANCIERS, REPRESENTED
BY ITS MANAGING DIRECTOR, SAM VARGHESE
NADAVALLIL HOUSE, THAZHAKKARA.

2. MARIAMMA SAM, MANAGING DIRECTOR,
NADAVALLIL FINANCIERS, NADAVALLIL HOUSE,
THAZHAKKARA, MAVELIKKARA.

3. STATE OF KERALA, REP. BY PUBLIC
PROSCUTOR, HIGH COURT OF KERALA.

BY ADV. SRI.V.SANTHARAM
SRI.ALEX ANTONY SEBASTIAN P.A.
PUBLIC PROSECUTOR SRI.K.A.AKBAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 4.10.2006, THE COURT ON 04/10/2006 DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.634 of 2004

Dated this the 4th day of October, 2006

JUDGMENT

The appeal is filed by the complainant who filed a complaint against respondents 1 and 2 alleging offence under Section 138 of the Negotiable Instruments Act. The case was posted for evidence on four consecutive postings. Applications were also filed on behalf of the complainant and those were being allowed. On 7.2.2004, when the case was posted for evidence, the complainant was absent, but his counsel was present and he applied for adjournment. It was rejected.

2. Admittedly, the case was posted for evidence to 7.2.2004, on which day the accused was acquitted under Section 256(1) of the Code. As per Section 256(1) of the Code, the accused can be acquitted for non appearance of the complainant only on the two types of days specified in the section. Those days are: 1) the day appointed for appearance of the accused (vide Section 251) or 2) the day subsequent thereto to which the case is adjourned for hearing (vide Section 254). The accused cannot be acquitted invoking Section 256(1) of the Code on any other day than which are specified in Section 256(1) of the Code.

3. It can also be seen that the complainant was absent and an application was filed by the pleader. That means, the complainant was represented by pleader. In cases where the complainant is represented by pleader, the Magistrate may dispense with the presence of the complainant and proceed with the case. The court ought to have proceeded under Sections 254 and 255 of the Code and not under Section 256(1) of the Code. It will be clear from From No.11 of the Criminal Rules of Practice provided for issuing the order under Section 256(1) of the Code, that it is only in cases where the complainant is not present or he is not being represented by the pleader that an order of acquittal can be passed under Section 256(1) of

the Code. In the above circumstances, the order under challenge is clearly illegal and it has to be set aside.

4. It is also stated in ground D that the complainant was present before the court on almost all the occasions and was represented and the case was adjourned at the request of the counsel for accused. But the counsel for the respondents raised a strong objection to this and he produced a certified copy of the proceeding sheet which shows that the complainant was absent on four consecutive postings before the accused was acquitted. But, it is relevant to note that on all those days, the accused were also absent. It is only on the day on which the accused was acquitted they were present. On going through the proceeding sheet, I find that out of the 11 postings of the case, the accused were present only on two occasions. Therefore, it cannot be said that the complainant alone was guilty of laches and hence I do not find any ground to impose any cost on the complainant as requested by the counsel for accused. Even though the reasons stated in ground D are not fully correct, I do not find that the respondents-accused are entitled for any cost from the complainant, on the facts of this case.

5. In the result, the order under challenge is set aside. The court below is directed to take the case on file and dispose of the same in accordance with law. The parties shall appear before the trial court on 11.12.2006.

The appeal is allowed.

K.HEMA, JUDGE

vgs.